A

Tenaga Nasional Bhd v Ice Man Sdn Bhd

B

HIGH COURT (JOHOR BAHRU) — CIVIL SUIT NO JA-22NCVC-38–03 OF 2018
AWANG ARMADAJAYA JC
13 JANUARY 2020

C

Civil Procedure — Amendment — Defence — Whether proposed amendments failed to answer plaintiff's claim and spoke of matters occurring outside relevant period of plaintiff's claim — Whether new matters contained in proposed amendments failed to fit in with rest of defence and sought to change character of suit — Whether defendant failed to explain why amendments were not made earlier — Whether late amendment application seemed to be a tactical manoeuvre and raised doubts about its bona fides — Whether defendant had not shown how it would suffer prejudice or injustice if proposed amendments were not allowed

D

The defendant was the plaintiff's customer for supply of electricity pursuant to a contract. In the instant action, the plaintiff sued the defendant for RM2,346,906.87 which, it claimed, was the loss it suffered as a result of tampering of the electricity meter at the defendant's premises such that actual consumption of electricity was not recorded. The plaintiff discovered the tampering when it carried out an inspection at the defendant's premises on 21 March 2012. The amount claimed was for the period from 6 September 2010 until 21 March 2012. After close of pleadings, the defendant successfully applied to strike out the plaintiff's action but that decision was set aside by the Court of Appeal which remitted the case back to the High Court for trial. The defendant then filed the instant application (encl 26) to amend its statement of defence to say that from 2013 onwards, a block ice plant, manufactured by a company named Four Seas Ice Manufacturer Sdn Bhd, was newly commissioned at the defendant's premises and problems with that plant had caused the defendant's electricity usage to be unstable.

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Held, dismissing encl 26:

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(1) The plaintiff's claim was based on matters that took place from 6 September 2010 until 21 March 2012. The proposed amendments, however, spoke about matters occurring from 2013 onwards and introduced a third party named Four Seas Ice Manufacturer Sdn Bhd. The amendments failed to answer the issue raised in the statement of claim (see para 24).

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(2) The fact that the proposed amendments did not jive with the rest of the statement of defence and also did not answer the plaintiff's claim denied

A the defendant's contention that the nature of the suit remained unchanged despite the amendments. On this ground alone, encl 26 had to be dismissed (see para 41).

(3) The defendant's application did not promote the speedy disposal of the B case and was more tactical than anything else. The matters sought to be included in the amendments were matters known to the defendant all along and could have been pleaded when the statement of defence was drafted or even before the pleadings had closed. Making the amendments at this late stage raised doubts about the bona fide of the application. A C bona fide application would have explained the reason for the delayed amendments and whether the proposed amendments had any prospect of success. This encl 26 failed to do (see para 47–49)

(4) The defendant had not shown how it would suffer injustice or prejudice if encl 26 was not allowed (see para 52). D

[Bahasa Malaysia summary

Defendan adalah pelanggan plaintif untuk bekalan elektrik berdasarkan suatu kontrak. Dalam tindakan semasa, plaintif menyaman defendan sebanyak E RM2,346,906.87 yang mana, tuntutan tersebut, adalah untuk kerugian yang dialami akibat gangguan meter elektrik di premis defendan sehingga penggunaan elektrik sebenarnya tidak dicatat. Plaintif mempunyai pengetahuan berkenaan gangguan tersebut apabila melakukan pemeriksaan di premis defendan pada 21 Mac 2012. Jumlah yang dituntut adalah untuk F tempoh dari 6 September 2010 hingga 21 Mac 2012. Selepas pliding ditutup, defendan berjaya membuat permohonan untuk membatalkan tuntutan plaintif tetapi keputusan tersebut diketepikan oleh Mahkamah Rayuan yang menolak semula kes tersebut ke Mahkamah Tinggi untuk dibicarakan. Defendan kemudian mengemukakan permohonan semasa (lampiran 26) G untuk meminda pernyataan pembelaannya untuk mengatakan bahawa bermula dari tahun 2013 dan seterusnya, sebuah kilang ais blok, yang dikendalikan oleh sebuah syarikat bernama Four Seas Ice Manufacturer Sdn Bhd, yang baru ditempatkan di premis defendan dan masalah dengan kilang tersebut telah menyebabkan penggunaan elektrik defendan menjadi tidak H stabil.

Diputuskan, menolak lampiran 26:

(1) Tuntutan plaintif adalah berdasarkan kepada perkara yang berlaku dari 6 September 2010 hingga 21 Mac 2012. Cadangan pindaan tersebut, I walaubagaimanapun, menyatakan perkara yang berlaku dari tahun 2013 dan seterusnya dan memperkenalkan pihak ketiga bernama Four Seas Ice Manufacturer Sdn Bhd. Pindaan tersebut gagal untuk menjawab persoalan yang dibangkitkan dalam pernyataan tuntutan (lihat perenggan 24).

(2) Fakta bahawa cadangan pindaan tidak selari dengan pernyataan pembelaan yang lain dan juga tidak menjawab tuntutan plaintif menafikan dakwaan defendan bahawa sifat tuntutan tersebut tetap tidak berubah walaupun terdapat pindaan. Atas alasan ini, lampiran 26 harus ditolak (lihat perenggan 41).

(3) Permohonan defendan tidak mendorong penyelesaian kes dengan cepat dan lebih kepada taktikal daripada perkara lain. Perkara yang ingin dimasukkan dalam pindaan adalah perkara yang diketahui oleh defendan selama ini dan seharusnya diplidkan ketika pernyataan pembelaan disediakan atau bahkan sebelum pliding ditutup. Membuat pindaan pada peringkat akhir ini menimbulkan keraguan mengenai bona fide permohonan. Permohonan yang bona fide akan menjelaskan alasan kelewatan pindaan dan sama ada cadangan pindaan tersebut mempunyai prospek untuk berjaya. Lampiran 26 ini gagal menjawabnya (lihat perenggan 47–49)

(4) Defendan tidak menunjukkan bagaimana ia akan mengalami ketidakadilan atau prejudis sekiranya lampiran 26 tidak dibenarkan (lihat perenggan 52).]

Cases referred to

Abdul Johari bin Abdul Rahman v Lim How Chong & Ors [1997]1 MLJ 629, CA (refd)

AON Risk Services Australia Ltd v Australian National University (2009) 258 ALR 14, HC (refd)

Cropper v Smith (1884) 26 Ch D 700, CA (refd)

Douglas v O'Neill [2011] EWHC 601 (QB), HC (refd)

GL Baker Ltd v Medway Building and Supplies Ltd [1958] 1 WLR 1216; [1958] 3 All ER 540, CA (folld)

Hague Plant Ltd v Hague & Ors [2014] EWHC 568 (Ch) (refd)

Hayden v Maidstone & Tunbridge Wells NHS Trust [2016] EWHC 1121 (QB), QBD (refd)

Hock Hua Bank Bhd v Leong Yew Chin [1987] 1 MLJ 230; [1987] 1 CLJ 126, SC (refd)

Hong Leong Finance Bhd v Low Thiam Hoe and another appeal [2016] 1 MLJ 301; [2016] 3 MLRA 81; [2015] 8 CLJ 1, FC (refd)

Ketteman and others v Hansel Properties Ltd [1988] 1 All ER 38, HL (refd)

Savings and Investment Bank Ltd v Fincken [2004] 1 All ER 1125, CA (folld)

Shoe Machinery Co Ltd v Cutlan [1896] 1 Ch 108, CA (refd)

Swain-Mason and others v Mills & Reeve [2011] EWCA Civ 14, CA (refd)

Tildesley v Harper (1878) 10 Ch D 393, CA (refd)

Worldwide Corpn Ltd v GPT Ltd [1998] All ER (D) 667, CA (refd)

Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd & Ors [1983] 1 MLJ 213, FC (refd)

Legislation referred to

Companies Act 1965
Rules of Court 2012 O 18 r 19(1)(a), (1)(b), (1)(c), (1)(d), O 20 r 5, 5(1), (3), (4), (5), O 92 r 4

Amnah bt Ismail (Othman Hashim & Co) for the plaintiff.
Lim Yew Yi (Kerk & Partners) for the defendant.

Awang Armadajaya JC:

INTRODUCTION

[1] This is an application to amend the statement of defence (encl 26) pursuant to O 20 r 5/O 92 r 4 of the Rules of Court 2012 where the defendant wishes to mention a third party, not previously named in the earlier statement of defence.

THE CAUSE PAPERS IN THIS APPLICATION

[2] The cause papers are as follows:

(a) bundle of pleadings that were closed on 2 May 2018;

(b) the defendant's notice of application to amend their defence (encl 26);

(c) defendant's affidavit in support dated 8 November 2019;

(d) plaintiff's affidavit in reply dated 22 November 2019;

(e) defendant's affidavit in reply dated 5 December 2019;

(f) plaintiff's affidavit in reply dated 16 December 2019;

(g) defendant's supplementary affidavit dated 21 November 2019;

(h) defendant's notice of application to strike out the plaintiff's writ of summons and statement of claim (encl 7) dated 25 May 2018;

(i) defendant's affidavit in support, in support of the defendant's striking out application (encl 7) dated 24 May 2018;

(j) plaintiff's affidavit in reply dated 24 June 2018;

(k) defendant's affidavit in reply dated 24 June 2018;

(l) the judgment of Johor Bahru High Court on encl 7 dated 30 September 2018;

(m) the grounds of judgment of the Johor Bahru High Court dated 31 December 2018;

(n) plaintiff's notice of appeal dated 23 October 2018;

(o) Court of Appeal's decision dated 23 August 2019; and

(p) defendant's notice of motion dated 19 September 2019 to the Federal Court for leave to appeal

THE LAW IN RESPECT OF AMENDMENTS TO STATEMENT OF DEFENCE

[3] The provision of law in respect of amendment of pleadings is found in O 20 r 5 of the Rules of Court 2012.

[4] The court has discretion to grant leave to amend pleadings. The court may at any stage of the proceedings allow:

(a) the plaintiff to amend his writ; or

(b) any party (to the proceeding) to amend his pleading.

This may be done on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct (O 20 r 5(1) of the Rules of Court 2012).

[5] The general principle is that the court will allow such amendments as will cause no injustice to the other parties. Three basic questions should be considered to determine whether injustice would or would not result:

(a) whether the application is bona fide;

(b) whether the prejudice caused to the other side can be compensated by costs; and

(c) whether the amendments would not in effect, turn the defence from one character into a suit of another and inconsistent character.

[6] In *Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd & Ors* [1983] 1 MLJ 213, the Federal Court succinctly puts it as follows:

> The Courts should lean towards granting applications for amendments even when a new cause of action or line of defence is raised, provided it is based on the same facts or arose out of the same transaction subject, however, to an award of costs to the other party for the injustice caused by the amendments.

[7] This was also applied in *Abdul Johari bin Abdul Rahman v Lim How Chong & Ors* [1997]1 MLJ 629, by the Court of Appeal.

[8] However, at the close of pleadings, the rules somewhat change a little. Application to amend pleading made after expiry of the period of limitation (O 20 r 5(3), (4), (5) of the Rules of Court 2012).

[9] In this instance, the general principles for the granting of leave to amend are as follows:

(a) all such amendments ought to be made 'for the purpose or determining real question in controversy between the parties to any proceedings or of correcting any defect or error in any proceedings

Lord Justice Jenkins in *GL Baker Ltd v Medway Building and Supplies Ltd* [1958] 1 WLR 1216 at p 1231; [1958] 3 All ER 540 at p 546 gave a very instructive insight as follows:

> It is a guiding principle of cardinal importance on the question of amendment that, generally speaking, all such amendments ought to be made 'for the purpose or determining real question in controversy between the parties to any proceedings or of correcting any defect or error in any proceedings.

(b) the allowance given must be for the purpose of doing overall justice when deciding the rights of parties.

Lord Justice Bowen LJ in *Cropper v Smith* (1884) 26 Ch D 700 at pp 710–722 has made this observation, inter alia:

> it is a well-established principle that the object of the Court is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights ... I know of no kind of error or mistake which, if not fraudulent or intended or overreach, the Court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy, and I do not regard such amendment as a matter of favour or grace ... It seems to me that as soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected if it can be done without injustice, as anything else in the case is a matter of right.

Lord Justice Smith expressed 'emphatic agreement' with the above observation in *Shoe Machinery Co Ltd v Cutlan* [1896] 1 Ch 108 at p 112;

(c) the general rule is to allow such amendments unless it was done with mala fide or the injury done to his opponent cannot be compensated by cost.

In *Tildesley v Harper* (1878) 10 Ch D 393at pp 396–397, Lord Justice Bramwell said:

> My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting mala fide, or that, by his blunder, he had done some injury to his opponent which could not be compensated for by costs or otherwise.

[10] It is clear that amendments would be allowed if it afford the party applying, the benefit of a defence which is curable ab initio, for the consideration of the court in the main suit.

[11] In *Hock Hua Bank Bhd v Leong Yew Chin* [1987] 1 MLJ 230; [1987] 1 CLJ 126, it was ruled that, inter alia:

> the underlying reasons governing the power under r 5 seem to be that if the proceedings had from the beginning been properly formulated and constituted in the circumstances specified in paras (3), (4) and (5) the defence of limitation would not have been available to the defendant, and accordingly the court, if in its discretion thinks it just to grant leave to amend defects in the writ or pleading within the scope of the circumstances specified in these paras, so that such defects in the proceedings are treated as having been cured ab initio, the defendant is not being deprived of the benefit of a defence which he would not have had if the proceedings had been so properly formulated or constituted in the first place.

[12] If the amendments resulted in a new cause of action which invites new reliefs, that should not be the basis of denying the amendments. The issue is one of 'whether the changes alleged in the amendment sought to be made are the same or substantially the same as those alleged to support a cause of action already pleaded'.

[13] Further in *Hock Hua Bank Bhd v Leong Yew Chin* [1987] 1 MLJ 230; [1987] 1 CLJ 126, it was explained that:

> The fact that a new relief or substantially new relief has arisen out of a new cause of action should not be a bar to the Court's power to grant leave under Rule 5. A new or substantially new relief which arises out of a new cause of action is in effect ancillary to the new cause of action and is indeed part and parcel of the new cause of action. The essential question to be considered in each case is 'whether the changes alleged in the amendment sought to be made are the same or substantially the same as those alleged to support a cause of action already pleaded.

THE BACKGROUND FACTS

[14] The background facts are as follows.

[15] The plaintiff is a public listed company incorporated under the Companies Act 1965 whose registered address is 14th Floor, Bangunan Dua Sentral, No 8, Jalan Tun Sambathan 50470 Kuala Lumpur and supplied electricity to the defendant, who is a registered consumer (accounts No 0340 00753047 07 and 0340 00753049 03) for the defendant's premise at PTD 140216 and PTD 140216-1, Jalan Berjaya 8/1, Taman Perindustrian Berjaya, Jalan Kempas Lama, 81200 Johor Bahru.

[16] An inspection was carried out on the defendant's premise on 21 March 2012 where it was found that there was tampering with the electricity supply meter which led to a claim made against the defendant for loss of revenue and cost amounting to the sum of RM2,346,906.87 for the period from 6 September 2010 until 21 March 2012. The pleadings were closed on 22 May 2018.

[17] On 25 May 2018, the defendant file an application to strike out the writ of summons and the statement of claim pursuant to O 18 r 19(1)(a), (1)(b), (1)(c) and/or (1)(d) of the Rules of Court 2012. And on 30 September 2018 the High Court in Johor Bahru allowed the striking out with cost of RM3,000.

[18] The plaintiff filed an appeal against the decision of the High Court in the Court of Appeal on 23 October 2018 and after hearing parties on 23 August 2018, the Court of Appeal allowed the appeal and set aside the order of the High Court to strike out the plaintiff's claims and remitted the matter to the High Court on 29 August 2019. On 13 November 2019, the defendant's filed this application (encl 26) in the High Court.

THE ARGUMENTS BEFORE THIS COURT

[19] In essence, the defendant's arguments may be summarised as follows:

(a) character of the writ action remains unchanged;

(b) no prejudice to the plaintiff as the plaintiff may apply to amend their pleadings;

(c) if disallowed, the defendant is prejudiced as it will not be allowed to adduce evidence in its defence; and

(d) this is a bona fide application.

[20] After hearing all parties, having read the cause papers and the written submissions, I have come to this decision. I shall deal with each grounds.

Character of the writ action remains unchanged

[21] Essentially the defence of the defendant were that the amount of claim were excessive, unreasonable and unjustifiable.

[22] Apart from that, since the meter room is under locks and keys, the defendant have no access to the meter room and hence could not possibly tampered.

[23] The proposed amendments to the statement of defence reads as follows:

12.1 Only from 2013 onwards, a Block Ice Plant was put into operation with the electricity supplied by the Plaintiff to the said premises. However due to frequent breakdowns, its operation was erratic. This made the electricity usage by the Defendant unstable at the material times. The operation of the Block Ice Plant only became normalised from the second quarter of 2014 onwards.

12.2 Four Seas Ice Manufacturer Sdn Bhd constructed the Block Ice Plant and operated it jointly with the Defendant.

[24] Keeping in mind, that an inspection was carried out on the defendant's premise on 21 March 2012 where it was found that there was tampering with the electricity supply meter which led to a claim made against the defendant for loss of revenue and cost amounting to the sum of RM2,346,906.87 for the period from 6 September 2010 until 21 March 2012, there are two things to be noted:

(a) the proposed amendments talks of the year 2013 onwards; and

(b) the introduction of a third party Four Seas Ice Manufacturer Sdn Bhd, which constructed and maintained the Block Ice Plant.

[25] It does not answer the issue raised in the statement of claim which is 'An inspection was carried out on the defendant's premise on 21 March 2012 where it was found that there was tampering with the electricity supply meter which led to a claim made against the defendant for loss of revenue and cost amounting to the sum of RM2,346,906.87 for the period from 6 September 2010 until 21 March 2012'.

[26] The principle of law stated in *Hong Leong Finance Bhd v Low Thiam Hoe and another appeal* [2016] 1 MLJ 301; [2016] 3 MLRA 81; [2015] 8 CLJ 1:

The principles in *Yamaha Motors*'s case were laid down in respect of an application to amedn that was at an early stage of the proceedings in particular before the trial commences. The Court of Appeal fell into error of law when it applied the principles in *Yamaha Motor* without appreciating that those principles were insufficient to deal with an application to amend, which introduced two new defences on the eve of a trial.

[27] The Federal Court recognises the conditions set out in *Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd & Ors* [1983] 1 MLJ 213 which are:

Three basic questions should be considered to determine whether injustice would or would not result, *(1) whether the application is bona fide: (2) whether prejudice caused to the other side can be compensated bv costs and (3) whether the amendments would not in effect turn the suit from one character into a suit from one character into a suit of another and inconsistent character.* (See Mallal's Supreme Court Practice p342).

[28] However in *Hong Leong Finance Bhd* regards must be had on the following:

(a) whether amendments are made at the early stage or late stage;

(b) amendments cannot be compensated by cost alone; and

(c) amendments introduced third party which would change the character of the suit.

[29] The Federal Court ruled that 'When an application to amend a pleading is made at a very late stage, the principles in *Yamaha Motor* ought not to be the sole consideration. This was because an order for compensation by payment of costs in such a case may not be an adequate remedy and it would also disrupt the administration of justice. There had been five case managements since 2011 and there was no indication at all that an amendment application was contemplated by the defendant'.

[30] In our instant case, there have been many case managements. The defendant's contention was that they concentrated on the striking out application which was subsequently allowed by the High Court although later it was set aside by the Court of Appeal.

[31] I find this strange. A defendant would know the nature of his defence. He may of course, amend without leave before pleadings are closed. The defendant chose to hide his cards under his sleeves until he finds he could not do so anymore.

[32] Further, the proposed amendments are for the period of 2013 onwards whereas the claims for the defendant to answer is from 6 September 2010 until 21 March 2012.

[33] A trial is a place where all parties are to make full and frank disclosure to the court and facts that are material and relevant must be placed before the court. Failure to do so may result in injustice which the court cannot be blamed for given that it is the parties and not the court who are obliged to put their cards on the table. The excuse would be if we put the cards on the table, our adversary would know our defence. That is precisely what should be done as no trial by ambush is allowed in the civil trial.

[34] In *Hayden v Maidstone & Tunbridge Wells NHS Trust* [2016] EWHC 1121 (QB) Justice Foskett, albeit with 'considerable misgiving', allowed a defendant to rely on surveillance footage that had been disclosed so late that it caused the trial date to be vacated. The decision is not so much of interest because of its outcome but for the judge's more general comments on the issue

of when surveillance evidence might properly be served.

Background facts

[35] It was held that from May 2015, when their pain management expert expressed the view that it was possible the claimant was 'grossly exaggerating for the purposes of financial gain', the defendant had every reason to commission surveillance evidence. Its failure to do so until January 2016 was unexplained and unreasonable. A series of lengthy but less culpable delays thereafter meant that the edited surveillance was finally served by post on 24 March, Maundy Thursday and received on Tuesday 30 March. The defendant's application to rely on it came before Justice Foskett on 8 April who decided that the claimant should have time to consider her position and that therefore the trial due to commence in the week beginning 11 April had to be vacated.

[36] When it came back before him later that month he considered the events leading to that outcome and decided that the interests of justice required the evidence to be admitted. However, he declined to reserve costs to the trial judge holding that this was the 'clearest possible case in which the order should be that the defendant should bear the costs thrown away by the vacation of the trial date on the indemnity basis'. The defendant was also ordered to pay the costs of the claimant's experts considering the surveillance, again on the indemnity basis

Observations of the court

[37] In reaching this decision Justice Foskett made a number of useful observations on the approach that parties and the court should take to surveillance evidence. Lawyers on both sides would be well advised to take those points on board, particularly defendant representatives considering when to disclose footage:

(a) at para 1 the learned judge explained that he was giving the claimant time to consider whether she in fact wanted to oppose the application on the basis that this type of application can backfire on defendants and represent a bonus to claimants. It's easy to see how unconvincing footage, presumably the high water mark of a defendant's case, might lend weight to a claimant's case;

(b) at para 31, in the course of reviewing the authorities, he reiterated that the question of whether or not there is an ambush does not require a sinister motive to be shown but asks only whether the behaviour is otherwise culpable. Thus a defendant does not have to be shown to be acting in bad faith or sharply-what matters is the effect of the conduct on the claimant's ability to deal with the evidence fairly. The judge observed

at para 34 that were it necessary to find a deliberate attempt to wrong foot the claimant then this could only be done fairly in a mini-trial of the solicitor's conduct. This is the sort of satellite litigation which is to be avoided;

(c) reassuringly for those advising defendants it is clear from para 36 that his decision is not to be taken as altering the well-recognised position that a defendant is entitled to wait until a claimant has nailed his colours to the mast in a witness statement and/or schedule of loss before serving surveillance evidence;

(d) having considered paras 71 of Justice Callender QC's decision in *Douglas v O'Neill* [2011] EWHC 601 (QB) he held that the fact that footage existed and more significantly had been seen by experts was not determinative of the question of whether permission to rely on it should be given. Experts are capable of putting such material out of their minds when giving evidence, just as they know not to reveal matters discussed without prejudice. In this case the judge notes that the claimant's solicitors perceived it was inappropriate for the experts to be shown the surveillance footage before permission to rely on it was given but does not really deal with whether they were correct. One can see that if the experts' knowledge of the footage is, while not determinative, a relevant factor it might be improper to share it with experts and then make the application. Conversely the experts' opinion might be required to decide whether to make the application;

(e) he observed that any inadequacy in the rules dealing with surveillance was a matter for the Civil Procedure Committee but noted that two cases on that issue were heard in the Royal Courts of Justice on the same day;

(f) at paras 44–46 he questioned whether case management might resolve many such issues. It is the experience of the senior master that claimants often seek an order specifying a date by which surveillance evidence must be served and this is frequently resisted by defendants. It was suggested that it would be prudent for claimants to raise the matter with the court as soon as they are in receipt of expert reports which suggest there might be an issue and indeed for the court to raise it of its own motion at the case management stage; and

(g) finally, at para 47, once a claimant's case as to the level of disability is clearly articulated and the defendant has an expert opinion suggesting the claim is 'suspect', an obligation arises actively to obtain surveillance evidence if proportionate.

[38] In our instant case, the defendant would not have disclosed the purported new facts in the pleadings if the striking out of the writ of summons

and the statement of claim had succeeded. Now that has been set aside by the Court of Appeal, it is back to the drawing board.

[39] Now that is water under the bridge, the defendant must first obtain leave as decided by both *Yamaha Motor* and *Hong Leong Finance Bhd* cases.

[40] The third party which is now mentioned, if at all, were known to the defendants all along. Truth while it may be multifaceted, is singular in nature. Half-truths, untruths, non-truths comes in any shape and size.

[41] The very fact that the rest of the statement of defence does not jive with the proposed amendments and further the proposed amendments do not answer the claim made against them, deny the defendant's contention that the nature of the suit have remained unchanged.

[42] Hence, the burden to show that it has not change, I find that they failed to do.

[43] On this ground alone, this application should be dismissed with cost in the cause.

No prejudice to the plaintiff as the plaintiff may apply to amend their pleadings

[44] The plaintiff could no doubt, amend their pleadings. But the more important part is, the plaintiff may even have to add parties to this suit and this will drag the hearing. It is for this reason that the defendant must show to the court that this application is not meant to delay the trial, failing which the application should be disallowed.

[45] In *Hong Leong Finance Bhd v Low Thiam Hoe and another appeal* [2016] 1 MLJ 301; [2016] 3 MLRA 81; [2015] 8 CLJ 1, the Federal Court had the occasion of discussing amendments at a late stage where the issue of prejudice came and cost.

> [18] It is pertinent to note that *Yamaha Motor* was decided under the old RHC 1980. The civil procedure has since then changed with the introduction of the pre-trial case management in the year 2000 under O 34 of the RHC 1980 (wef 22 September 2000) and now under O 34 of the RC 2012 (wef 1 August 2012). *Nowadays the court recognises especially under the new case management regime that a different approach needs to be taken to prevent delay in the progress of a case to trial and for Its completion. The progress of the case is no longer left in the hands of the litigants but with the court in the driver's seat* (see the case of *Syed Omar Syed Mohamed v Perbadanan Nasional Bhd* [2012] 9 CLJ 557). In particular when an application to amend the pleading is made at a very late stage as was done in the present case, the principles in *Yamaha Motor* ought not to be the sole consideration. This is because

an order for compensation by payment of costs in such a case may not be an adequate remedy and it would also disrupt the administration of justice which affects the courts, the parties and the other users of the judicial process (see the case of *Conlay Construction Sdn Bhd v Perembun (M) Sdn Bhd* [2014] 1 MLJ 80; [2013] 9 CLJ 828).

...

[25] The courts in Malaysia have consistently held that where there is a delay in making an amendment application, the onus is on the applicant to furnish a reasonable explanation for such a delay. They seem to have considered this as an additional factor to the *Yamaha Motor*'s rules. The need to show 'some material and advance some cogent reasons' was applied in *Taisho Company Sdn Bhd v Pan Global Equities Bhd & Anor* [1999] 1 CLJ 703. Haidar JCA (as he then was) held:

> *The learned judge intimated that the application was made after the appellant failed on appeal to this court to affirm the judgment entered by it initially. Further, he said that the appellant had knowledge of the 'acknowledgement' as late as April 1987, that is, four years before the action was filed. Furthermore, the application was filed four years after the commencement of this action. We would add further that no reasons were given for the delay in filing the application when the point of admission was obviously available even before filing the proceedings. As rightly opined by the learned JC in Multi-Pak Singapore Pte Ltd and correctly followed by the learned judge, the appellant did not place some material and advance some cogent reasons to impel the court to lean on its side. We would further add that the application borders on lack of bona fides, one of the basic question set out in Yamaha Motor Co Ltd.* (Emphasis added.)

The requirement to advance some material and cogent reasons was likewise followed in the subsequent decisions in the cases of *Raphael Pura v Insas Bhd & Anor* [2000] 4 CLJ 830 and *Everise Hectares Sdn Bhd v Citibank Bhd* [2011] 2 CLJ 25.

[26] *It is to be stated here the requirement that a cogent explanation for such a delay must be furnished when making a late application to amend would be clearly in line with pre-trial case management procedures (introduced in year 2000). The management of cases by the courts prior to the trial is intended to ensure 'just, expeditious and economical disposal' of an action.* (See O 34 r 4(1) of the RHC 1980 (now O 34 r 1(1) of the RC 2012) and the Practice Direction No 2 of 2014 issued by the Chief Judge of High Court in Malaya). Timely disposal of cases and the limitation of cost are now the primary considerations under the present regime.

[27] *In our instant case. there had been five case managements since 2011 and there was no indication at all that an amendment application was contemplated by the defendant. The only explanation given by the defendant in his affidavit for the delay was that he had only discovered that these new issues were not pleaded when preparing for trial. Such an explanation in our view surely cannot be acceptable.*

[46] In our instant case, there were more than ten, but the defendant did not find it fit and proper to make the amendments. In the days of multitasking, the excuse that the counsel was concentrating on the striking out application is unacceptable.

[47] In fact, this delay was more tactical than anything else. Since it does not promote the speedy disposal of the case, it must be refused.

If disallowed, the defendant is prejudiced as it will not be allowed to adduce evidence in its defence

[48] The defendant should have considered this during the drafting of the defence and if overlooked at the material time, there were plenty of time before the closing of pleadings.

[49] The very fact that at this late stage, this was raised, gave concerns of the bona fide nature of the proposed defence.

[50] In the United Kingdom as far back as 1988, the House of Lords in the decision of *Ketteman and others v Hansel Properties Ltd* [1988] 1 All ER 38 had already taken into consideration the strain of litigation on parties when new issues are introduced and an amendment application is made late. The statement of a general principle against delayed amendment was well set out by Lord Griffiths in that case at p 62 as follows:

> Whether an amendment should be granted is a matter for the discretion of the *trial judge and he should be guided in the exercise of the discretion by his assessment of where justice lies. Many and diverse factors will bear on the exercise of this discretion. I do not think it possible to enumerate them all or wise to attempt to do so. But justice cannot always be measured in terms of money and in my view a judge is entitled to weigh in the balance the strain the litigation imposes on litigants, particularly if they are personal litigants rather than business corporations, the anxieties occasioned by facing new issues, the raising of false hopes, and the legitimate expectation that the trial will determine the issues one way or the other. Furthermore, to allow an amendment before a trial begin, it is quite different from allowing it at the end of the trial to give an apparently unsuccessful defendant an opportunity to renew the fight on an entirely different defence.*
>
> *Another factor that a judge must weigh in the balance is the pressure on the courts caused by the great increase in litigation and the consequent necessity that, in the Interests of the whole community, legal business should be conducted efficiently. We can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in a more leisured age. There will be cases in which justice will be better served by allowing the consequences of the negligence of the lawyers to fall on their own heads rather than by allowing an amendment at a very late stage of the proceedings.* (Emphasis added.)

[51] Following the Lord Woolfs Reforms in United Kingdom, a robust approach against last minute amendment was postulated in the leading case of *Worldwide Corpn Ltd v GPT Ltd* [1998] All ER (D) 667. In this case the claimant sought to amend its claim 11 days before the trial commenced. The claimant sought to amend and introduce a new case after realising that it could

not succeed based on its pleaded case. The High Court dismissed the application. On appeal, Waller LJ held as follows:

> *... in previous eras it was more readily assumed that if the amending party paid his opponent the costs of an adjournment that was sufficient compensation to that opponent. In the modern era it is more readily recognised that in truth the payment of costs of an adjournment may well not adequately compensate someone who is desirous of being rid of a piece of litigation which has been hanging over his head for some time, and may not adequately compensate him for being totally (and we are afraid there are no better words for it) 'mucked around' at the last moment. Furthermore, the courts are now more conscious that in assessing the justice of a particular case the disruption caused to other litigants by last minute adjournments and last minute applications have also to be brought into the scales.*
>
> *We share Millett LJ's concern that justice must not be sacrificed, but we believe his view does not give sufficient regard to the fact that the courts are concerned to do justice to all litigants, and that it may be necessary to take decisions vis-a-vis on litigant who may, despite all the opportunity he or his advisers have had to plead his case properly, feel some sense of personal injustice, for the sake of doing justice both to his opponent and to other litigants.*
>
> *Where a party has had many months to consider how he wants to put his case and where it is not by virtue of some new factor appearing from some disclosure only recently made, why, one asks rhetorically, should he be entitled to cause the trial to be delayed so far as his opponent is concerned and why should he be entitled to cause inconvenience to other litigants? The only answer which can be given and which, Mr Brodie has suggested, applies in the instant case is that without the amendment a serious injustice may be done because the new case is the only way the case can be argued, and it raises the true issue between the parties which justice requires should be decided.*
>
> We accept that at the end of the day a balance has to be struck. The court is concerned with doing justice, but justice to all litigants, and *thus where a last minute amendment is sought with the consequences indicated, the onus will be a heavy one on the amending party to show the strength of the new case and why justice both to him, his opponent and other litigants, requires him to be able to pursue it.* (Emphasis added.)

[52] Having perused over all the above authorities, the applicant (which is the defendant here) is unable to persuade this court that injustice would be perpetuated against them for disallowing this application because:

(a) the defendant failed to show how this defence would actually answer the claims made against them;

(b) the defendant showed nothing in terms of prospect of success, much less a good prospect;

(c) no proper explanation was provided except for the allegation that they were concentrating on the striking out application, something which this court is unable to swallow given that the concept of multitasking is universal and definitely not local; and

(d) apart from bare assertion of the deprivation of the adducing evidence, there was little else.

This is a bona fide application

In the case of *Savings and Investment Bank Ltd v Fincken* [2004] 1 All ER 1125, it was held that the Court clearly expects the new case to have more than 'some prospect of success', particularly for late applications. The Court of Appeal held that:

> Ms Gloster submits that it is enough that these amendments have some prospect of success. That may be a suitable test where an amendment comes at a reasonably early stage of proceedings. *After all, if anvpleadinq whether bv amendment or not. cannot meet the test of some real prospect of success, it is in danger of being struck out. In my judgment, however, the proper rule or guideline calls for a sliding scale: the later the amendment. the more it may require to commend it* ... (Emphasis added.)

[53] The issue of a bona fide application must be tested against the real prospect of success. As alluded to earlier in this judgment, nothing significant was said of how this proposed amendment to the defence would have any prospect of success, let alone a good one. I agree with the Court of Appeal in England and Wales in *Savings and Investment Bank Ltd v Fincken*.

[54] In the case of *Swain-Mason and others v Mills & Reeve* [2011] EWCA Civ 14, the English Court of Appeal reiterated the need for an explanation for the delay in late applications and further stated that the proposed amendments had to be clear and detailed:

> A point which also seems to me to be highly pertinent is that, if a very late amendment is to be made, it is a matter of obligation on the party amending to put forward an amended text which itself satisfies to the full the requirements of proper pleading. It should not be acceptable for the party to say that deficiencies in the pleading can be made good from evidence to be adduced in due course, or by way of further information if requested, or as volunteered without any request. *The opponent must know from the moment that the amendment is made what is the amended case that he has to meet, with as much clarity and detail as he is entitled to under the rules.*
>
> First, as *Worldwide Corporation v GPT* shows, there is a heavy burden on party who seeks to raise a new and significantly different case so tate as the opening of the trial. *The party applying to amend needs to show why the change is sought so late and was not sought earlier.* (Emphasis added.)

[55] In *Hague Plant Ltd v Hague & Ors* [2014] EWHC 568 (Ch), the High Court considered an application to amend the statement of claim 2 1/2 years after the action was filed. In dismissing the amendment application, the High Court referred to the principles laid down in *Swain-Mason and others v Mills &*

Reeve and *Worldwide Corpn Ltd* and reiterated that the court is and should be less ready to allow a very late amendment than it used to be in former times, and that a heavy onus lies on a party seeking to make a very late amendment to justify it.

[56] In 2009, the High Court of Australia had the opportunity to consider the same issue in *AON Risk Services Australia Ltd v Australian National University* (2009) 258 ALR 14. Justice Heydon having considered *Worldwide Corpn Ltd* had this to say:

> [111] *An application for leave to amend a pleading should not be approached on the basis that a party is entitled to raise an arguable claim, subject to payment of costs by way of compensation. There is no such entitlement.* All matters relevant to the exercise of the power to permit amendment should be weighed. *The fact of substantial delay and wasted costs, the concerns of case management, will assume importance on an application for leave to amend ...*
>
> [112] A party has the right to bring proceedings. Parties have choices as to what claims are to be made and how they are to be framed. But limits will be placed upon their ability to effect changes to their pleadings, particularly if litigation is advanced. That is why, in seeking the just resolution of the dispute, reference is made to parties having a sufficient opportunity to identify the issues they seek to agitate.
>
> [113] *In the past it has been left largely to the parties to prepare for trial and to seek the court's assistance as required. Those times are long gone.* The allocation of power, between litigants and the courts arises from tradition and from principles and policy. It is recognised by the courts that the resolution of disputes serves the public as a whole, not merely the parties to the proceedings.
>
> [114] Rule 21 of the Court Procedures Rules recognises the purposes of case management by the courts. *It recognises that delay and costs are undesirable and that delay has deleterious effects, not only upon the party to the proceedings in question, but to other litigants. The Rule's objectives, as to the timely disposal of cases and the limitation of cost, were to be applied in considering ANU's application for amendment. It was significant that the effect of its delay in applying would be that a trial was lost and litigation substantially recommenced. It would impact upon other litigants seeking a resolution of their cases. What was a Just resolution' of ANU's claim required serious consideration of these matters, and not merely whether it had an arguable claim to put forward Ajust resolution of its claim necessarily had to have regard to the position of AON in defending it. An assumption that costs will always be a sufficient compensation for the prejudice caused by amendment is not reflected in r 21. Critically, the matters relevant to a just resolution of ANU's claim required ANU to provide some explanation for its delay in seeking the amendment if the discretion under r 502(1) was to be exercised in its favour and to the disadvantage of AON. None was provided.* (Emphasis added.)

[57] Coming back to the instant case and with the greatest respect, I am unable to see that this is a bona fide application because a bona fide application would be made early or that there must be adequate explanation for the delay and how it would have good prospects to succeed

CONCLUSION

[58] These authorities illustrate the concerns of this court. This court is unconvinced that the defendant knew from the start of what their proper defence should be.

[59] *The proposed amendments are for the period of 2013 onwards whereas the claims for the defendant to answer is from 6 September 2010 until 21 March 2012.*

[60] It may be that they decided to look for one in face of indefensible claims.

[61] I say this, in my evaluation of the proposed amendments and does not influence this court in the assessment of the evidence and the case, in a full trial. I am reminded that the plaintiff still bears the burden of proving his case on balance of probabilities, failing which, I shall dismiss the claims.

[62] I find that I need not address the other grounds in detail but suffice that I am of the considered view the other grounds would not have changed the decision that I have come to as stated above.

Enclosure 26 dismissed.

Reported by Ashok Kumar